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Supreme Court Of The United States

October Term 1973

No. 73-11

ASSOCIATED STUDENTS OF WESTERN KENTUCKY UNIVERSITY, LINDA JONES, REGINALD GLASS, ALBERT STITH, PATRICK LONG, EDWARD JORDAN, CHARLES BOTELER, AND MICHAEL FIORELLA . . . . . *Petitioners*

versus

DERO G. DOWNING, President of Western Kentucky University, CHARLES KEOWN, and the BOARD OF REGENTS OF WESTERN KENTUCKY UNIVERSITY, a Body Corporate . . . . . *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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The Respondents pray that the Court deny the petition to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on March 28, 1973.

Questions Presented

1. Whether the cancellation of "The Films of John Lennon and Yoko Ono" and "Genesis 4" by Respondents constituted an impermissible act of governmental censorship in violation of rights guaranteed to the Petitioners and to the students of Western Kentucky University by the First and Fourteenth Amendments to the Constitution of the United States.

2. Whether the absence of officially-promulgated and constitutionally valid standards governing film selection and the content of educational and cultural programs precluded Respondents from prohibiting the showing of films selected by the Petitioners or the conducting of educational and cultural programs sponsored by the Petitioners.

3. Whether Respondents, who have for years jointly and cooperatively with Petitioners, arranged, contracted for, and co-sponsored a series of campus entertainment events, lawfully determined that the scheduled public exhibition of the films was inappropriate as a part of the University educational, cultural and entertainment program, even though the films had not been determined to be "obscene" in the constitutional sense.

Statutory Provision

Kentucky Revised Statutes 164.350 provides, in pertinent part, as follows:

> The government of each of the state universities... is vested in its respective board of regents. Each board of regents...shall constitute a body corporate, with

> the usual corporate powers, and with all immunities, rights, privileges and franchises usually attaching to the governing bodies of educational institutions. Each board may: ..... Determine the number of divisions, departments, bureaus, offices and agencies needed for the successful conduct of the affairs of the university...

STATEMENT OF THE CASE

Actions Below

Petitioners (hereinafter called Associated Students) filed this action against Respondents (hereinafter referred to as the University, or by name and title of the particular office or official) in the United States District Court for the Western District of Kentucky, Bowling Green Division.

The suit asked for declaratory and injunctive relief alleging violation of rights to receive information and to freedom of expression.

The District Court conducted a full evidentiary hearing on May 12, 1972. (Pet., 9)* and dismissed the complaint on June 5, 1972. The opinion is unreported. The United States Court of Appeals for the Sixth Circuit affirmed March 28, 1973. (Pet. , 9). The opinion is reported at 475 F. 2d 1132.

The Parties and Their Functions

The University is a state-supported institution of higher learning located in Bowling Green, Kentucky with a co-educational enrollment of about 10,000 students, ranging from 16 years upward. (Pet., 14; T. R., 161).**

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*"Pet.," refers to Petition For A Writ of Certiorari to The U. S. Court of Appeals for the sixth circuit.

**"T. R.," refers to the Transcript of Proceedings of the May 12, 1972 hearing.

The Kentucky General Assembly raises revenue to finance institutions of higher education by two main methods, i.e., general fund tax levies and statutory imposition of charges for services (called fees), e.g., tuition, housing rentals and student activity fees. All money furnished by the state to finance University programs, *including student activity fees*, is raised into the General Fund by legislation and appropriated by the Kentucky legislature. (T. R., 141-145). The Appropriation Acts read, as follows:

> "There is appropriated..."[to Western Kentucky University]... "all the fees (which includes fees for board and room, athletics, and student activities..." (Kentucky Acts 1970, Ch. 15, p. 53; 1972, Ch. 60, p. 215.).

Associated Students is a campus student organization officially recognized by the institution. (Pet., 13). This status does not entitle Associated Students, under state law or board rule, to any public financial support or to share generally in decisions as to the content of the University's educational, cultural, or social entertainment programs on campus. (Pet., 14; T. R., 145-146, 155-156) except that the President of Associated Students also is a member of the governing Board of Regents. Since June 1972, the student regent has full voting privileges. (Pet., 13; T. R., 43-44).

The President of the University and other academic officials are designated as the exclusive agents of the Board for selecting, developing and administering University programs and funds. Ultimate accountability to the General Assembly for the wisdom as well as the honesty of program expenditure rests here. No delegation of authority for Associated Students to so function has been made. No public accountability is required or expected of Associated Students. (T. R., 41-43; 144-146; 155-156).

Counsel for Petitioner continue to assert that Associated Students conducts an on-going program, part of which is showing films, and that the University merely "co-signs" booking agreements. (Pet., 3). Actually, as the Court of Appeals stated, the programs, cultural, social and entertainment, have been jointly planned and operated by the University Office of Student Affairs and Associated Students since inception of the series in about 1966. (Pet., 10; T. R., 153-155). The District Court found that the University officials have over the years engaged in the decision-making process both as to selection and content of the programs under consideration. (Pet., 14). Associated Students were consulted and their preferences sought and considered, but the University was a full party to the contracts in an approval not a *pro forma* capacity. (Pet., 10; T. R., 153-155).

The University has not promulgated specific formal written rules, statutes or regulations describing criteria or standards for the selection of films. Procedures are informal. However, each year the President and the Dean of Student Affairs have held a series of conferences with Associated Student leadership followed by confirming memorandums. Therein, specific actual notice was given as to the precise roles of the University Office of Student Affairs and Associated Students' with respect to cultural and entertainment program selection guidelines and understandings. Associated Students understood the ground rules. (T. R., 41-43; 46-50; 152-156; 162-167; 242; 254-255).

The Films--Booking Contract--Cancellation

The contract was executed, without specific knowledge as to the subject matter of the film, by a subordinate in the Office of Student Affairs. (T. R., 244-245). Afterwards, the Dean of Student Affairs, Keown, discovered a distributor's

leaflet describing the films that had been contracted for under the general title of "The Films of John Lennon and Yoko Ono". The description was of the film, "The Fly". It read, in pertinent part:

> "Fly" is a twenty-minute film showing a fly crawling or sitting on a nude female body." (Pet. 14-15; T. R., 111-113.)

The District Court Judge viewed "The Fly" in chambers and described it. (Pet., 15-16).

The details had not been suggested earlier by the contract title. The Dean of Student Affairs viewed the film, together with other members of the Student Affairs Office Staff and Associated Students' Vice President, Glass. (T. R., 186-187). No basis exist in the record for the assertion that the Dean "...was the only University person to preview the movie". (Pet., 7). The Dean concluded that the questioned portion was "gross", "offensive", "lewd", "unrefined", "crude", "no educational value", "coarse", and that: "It would be inappropriate for the University to continue as a contracting co-sponsor, "and" ...not in the best interest of the University." (Pet., 15; T. R., 113-115; 123). Petitioners did not elect available appeals procedure to the Vice-President for Administrative Affairs, then to the President, then to the Board of Regents. (T. R., 168-169). Nevertheless, the President's concurrence with Krown's decision was made known. (Pet., 15; T. R., 156-157; 162-163).

Negotiations with the Associated Students to delete "The Fly" were fruitless, notwithstanding the producer did agree. The University did not object to the Associated Students showing the film off campus in a non-university facility. Efforts to find acceptable alternative places failed and the University

cancelled the booking contract for "The Films of John Lennon and Yoko Ono". (Pet., 15).

Upon being advised by the distributor that "Genesis 4" also contained similar sexually explicit material, the University cancelled that booking contract. (T. R., 128-134).

The Bowling Green Chief of Police and the Chief of Detectives, both of whom viewed the film "The Fly" after suit was filed, described it as "filthy" and indicated that arrests would have been made if it had been shown. (Pet., 16).

The films were unrated. (T. R., 76). Advertising material furnished by the distributor contained a warning that it was recommended "for mature audiences only." Not all of Associated Students' ads for this showing carried the warning. (Pet., 16; T. R., 56-59). The District Court found that it would not have been so restricted at the proposed showing on campus, and also that "The Fly" would not have been shown at downtown commercial houses under their present policy because unrated movies automatically are rated "X", and are not shown in any of the Bowling Green commercial theaters. (Pet., 16).

REASONS FOR DENYING THE WRIT

Certiorari should be denied because:

(1) the Court below correctly decided the Federal questions in a manner consistent with decisions of this Court;

(2) this Court has denied review of cases decided by Courts of Appeal in other circuits that are factually similar to and indistinguishable in principle from this case;

(3) the petition fails to state the basis for Federal jurisdiction in the court of first instance, as required by Supreme Court Rule 23g.

(1). The decision below is entirely consistent with this Court's rulings in *Papish v. The Board of Curators of The University of Missouri*, et al.,____U.S.____ 93 S. Ct. 1197, 35 L. Ed. 2d 618 (1973) and *Healy et al., v. James, et al.*,____ U.S.____ 92 S. Ct. 2338, 33 L. Ed. 2d 266 (1972).

Those cases involved media and subject matter entitled to the greatest protection, i.e., newspaper distribution in *Papish*, and associational rights in *Healy*.

In *Papish*, the full disciplinary authority of the University was brought to bear upon the newspaper distributing student. The result was the extreme academic punitive sanction, i.e., expulsion from the University community.

In *Healy*, constitutionally permissable reasons for denying associational rights were not shown to be of record.

In both cases, University action was brought into direct and sharp conflict with basic fundamental rights.

In contrast, this Respondent has imposed no punitive disciplinary sanction against any person. (T. R., 156). It merely withdrew its co-sponsorship by cancelling its contract with the third party distributor, and denied Associated Students permission to use a campus facility for the previously scheduled exhibition.

Kentucky law speaks to student participation in governing decisions and shaping program development at the University. The student body elects from its ranks a member of the governing Board of Regents. (Pet., 13; T. R., 44).

Neither state law nor the Board of Regents nor custom have conferred upon Associated Students what they described in their complaint as the "designated function of selecting, conducting, and operating a program of films for the students." Certainly, the Constitution of the United States does not confer such a function upon Associated Students.

The University's actions were measured, and did not infringe upon Petitioners' constitutional rights. No basis exists in this record for Petitioner's assertion that "...[c]arried to its fullest, the University's position could proscribe anything--speech, movie, book--that it found offensive."The practical reality of this case is that Respondent did not proscribe anything. It merely withdrew as co-sponsor and denied use of a campus facility. Essentially, this dispute arose because of philosophical differences of opinion about the extent to which and in what manner students are to participate in University governance, and in shaping the development of campus programs. This Court has cautioned against judicial resolution of such intramural academic conflicts. *(Epperson v. Arkansas*, 393 U. S. 97, 89 S. Ct. 266, 21 L. Ed 2d 228 (1968).*)*

Basic constitutional values are not involved, much less in a direct and sharp conflict. Associated Students assert, presumably under the First Amendment, a constitutional right to solely select films of its own choosing for public exhibition in a campus facility at University expense involving employees of the University as a part of the University's educational program with the University acting as a co-sponsor. University officials would function as mere ministerial participants, even contrary to conscience and good faith judgment. Such a pattern of governance is not envisioned by state law or action of the Board of Regents. The First Amendment does not require it.

Reason No. 2, advanced on page 6 of the petition, appears to be an argument addressed to the merits rather than to the question of whether this record presents questions needing review by this Court.

The answer to the argument is that due process requirements of the Fourteenth Amendment do not impose upon state supported Universities the burden of promulgating formal

written standards to guide day by day educational program decisions not adversely affecting life, liberty, or property rights. It is one thing to require Universities to promulgate formal written rules and standards as a fair notice ingredient of due process to govern disciplinary proceedings leading to imposition of serious sanctions, e.g., separation from the University. It is quite another thing to suggest that every state university decision involving the selection or deletion of a particular entertainment event, cultural or educational program is of the same nature, and requires previously promulgated formal written standards. *(Healy v. James*, 33 L. Ed 2d 266, 291. (Rehinquist, J. concurring).

To impose an administrative procedures act type rule-making requirement would render the University muscle-bound. *(The College Counsel*, Vol. VII, No. 1, p. 1, Proceedings: National Association of College and University Attorneys, 12th Annual Conference (1972), Harlan Cleveland: *The Muscle Bound Academy.)*. It would create unnecessary insecurity and uncertainty in the Universities as to the validity of a wide-range of routine judgments historically made in the scholarly community without such standards, e.g., (a) selection of textbook "A" rather than "B" or "C" or another; or (b) a decision that the department of English will offer a major in poetry, but not in pornography and salacious literature.

In any event, Associated Students suffered no prejudice from absence of formal standards. At all times they have had specific and actual notice that University officers and not Associated Students would select or approve the content of such programs.

The dispositive issues of this case made it unnecessary for the District Court to decide or even to consider, or the Circuit Court to review, the issue collaterally raised but abandoned, as

to whether or not the cancelled films are "obscene" in the constitutional sense. *(Close v. Lederle*, 424 F. 2d 988 (1970); cert. denied, 400 U. S. 903, 91 S. Ct. 141, 27 L. Ed. 2d 140, *Presidents' Council, District 25, et al v. Community School Board No. 25 et al*, 457 F 2d 289 (1972); cert. den'd, _____ U. S.____, ____S. Ct. ____, 34 L. Ed 260).

Considerations of gravity or importance do not require this Court to review the question of whether by cooperating with its student body on worthwhile endeavors the University officials abdicated official responsibility, and, impliedly delegated to Associated Students the "...designated function of selecting, conducting and operating a program of films..." excluding only student choices of films that are "obscene" in a constitutional sense.

The "speaker ban" cases, and cases of institutional censorship of student programs were properly distinguished below e.g., *(Brooks v. Auburn University*, 412 F. 2d 1171, (5 cir. 1969), *Korn v. Elkins*, 317 F. Supp. 138 (D. Md. 1970); and *Antonelli v. Hammond*, 308 F. Supp. 1329 (D. Mon. 1970). In those cases the University was involved neither as a co-sponsor nor as a participant with the student group.

In the speaker cases, university officials denied permission for guests invited by students to speak on campus because they might break the law while on campus. Undifferentiated fear was an impermissible basis for a decision directly and sharply curtailing free exchange of political or social doctrine, neither of which is claimed to be the subject matter of this film.

In the censorship cases university officials interferred *ad hoc* to suppress controversial editions of campus publications after having fostered and encouraged the notion that the publication was a free and open student-managed and controlled forum for the expression of student views and opinions.

(2). This Court has denied review of cases decided by Courts of Appeal in other circuits that are factually similar to and indistinguishable in principle from this case.

Second Circuit.

A state legislature vested School Boards with authority to select textbooks and other instructional material. Board No. 25, by resolution, removed from the shelves of junior high school libraries copies of "Down These Mean Streets," a novel by Piri Thomas. Parents had objected to it because of explicit sexual material, although it was not determined to be "obscene" in a legal sense. An organization of parents, teachers, students, a librarian and a principal, brought an action for injunctive and declaratory relief for violation of civil rights.

The United States Court of Appeals, Second Circuit, affirmed the order of dismissal entered by the United States District Court, Eastern District of New York.(*President's Council District 25, et al v. Community School Board No. 25, et al.* 457 F. 2d 289 (1972); cert. denied, ___U.S.__ , ___ S. Ct. ____, 34 L. Ed 2d 260).

The Court of Appeals found no infringement upon any basic constitutional values. It noted the absence of any official tampering with academic freedom to teach any theory or doctrine and the fact that no penalty had been imposed on the librarian. *Epperson* was thus destinguished. *(President's Council District 25, supra at* 292).

It rejected the argument that unless the book was "obscene" in the legal sense, students had an unqualified right of access, even though the proper authorities deemed the work to be without merit as a work of art or science. *(Ibid).*

First Circuit

A university officer, without seeing them, agreed to exhibit an art instructor's paintings on corridor walls of the university student union building. The paintings contained sexually explicit themes. The exhibition hung for five of the twenty-four days scheduled, then, were removed by the President. The artist obtained declaratory and injunctive relief in the United States District Court for the District of Massachusetts. The United States Court of Appeals, First Circuit reversed. *(Close v. Lederle* 424 F. 2d 988 (1970); cert. denied, 400 U. S. 903, 91 S. Ct. 141, 27 L. Ed 2d 140).

The Court of Appeals considered the artist's constitutional interest to be minimal, not involving expression of political or social ideas. The Court refused to apply the doctrine of "chilling effect" and prejudice from lack of promulgated standards to give fair warning on the grounds that no penalty was involved except an order to desist. *(Ibid., at 990, fn. 1.)*

The University's counter interest was in determining the primary and appropriate use of the campus facility. The University was warranted in finding the exhibit inappropriate to that use without a determination of its "obscenity".

Ninth Circuit

The United States Court of Appeals, Ninth Circuit adopted the same views in *Sellers v. The Regents of the University of California*, 432 F. 2d 493 (1970); *cert. denied*, 401 U. S. 981, 91 S. Ct. 1194, 28 L. Ed 2d 333.

A campus organization applied through channels for use of a campus building. The University rule was that, "University facilities shall not be used for the purpose of organizing or carrying out unlawful activity." Approval was given with con-

ditions. Later, on advice of counsel that the proposed meeting would violate 50 U. S. C. App. 462 (a), the Chancellor withdrew conditional approval and denied use of the building. The two basic issues involved the propriety of convening a three-judge court. However, since the constitutionality of the institution's action had been briefed and argued, the Court expressed its views in detail. It found that the rule was valid on its face, and, as applied, resulted only in incidental infringement on First Amendment freedoms with no "chilling effect". It noted the reasonableness of the action and the absence of sanction other than denial of us of a facility.

(3). The petition fails to state the basis for Federal jurisdiction in the court of first instance as required by Supreme Court Rule 23g.

This is a purely formal reason. Respondents did not raise the issue of jurisdiction in the lower courts, but, calls the attention of the Court to Rule 23g. The rule requires the statement to show the basis of jurisdiction in the court of first instance. The petition is deficient in that respect.

CONCLUSION

For reasons stated above the petition for a writ of certiori should be denied.

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